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Supreme Court, U.S.
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No. 07-276

IN THE
Supreme Court of the United States

GRANT BAKER, ET AL.,
Conditional Cross-Petitioners,

v.

EXXON MOBIL CORP. AND EXXON SHIPPING CO.,
Conditional Cross-Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in cutting the jury's punitive damages award by half on the ground that it exceeds the maximum allowed under the Due Process Clause.

PARTIES TO THE PROCEEDINGS

Conditional Cross-Petitioners, plaintiffs below, are Grant Baker, Louie E. Alber, Ahmet Artuner, Jeffrey Bailey, William Bennett, Michael Wayne Bullock, Robyne L. Butler, Albert Ray Carroll, Larry L. Dooley, Mark Doumit, Douglas R. Jensen, Dennis G. Johnson, Donald P. Kompkoff, Sr., Josef Kopecky, Daniel Lowell, Andrean E. Martusheff, Carol Ann Maxwell, Jacquelan Jill Maxwell, Robert A. Maxwell, Sr., Michael McLenaghan, Elenore E. McMullen, Leslie R. Meredith, Leonard S. Ogle, Steven T. Olsen, August M. Pedersen, Jr., Mary Lou Redmond, Joseph David Stanton, Jean A. Tisdall, Darrell Wood, the Alaska Sport Fishing Association, Debra Lee, Inc., Dew Drop, Inc., and the Native Village of Tatitlek. They are representatives of a mandatory punitive damages class certified by the district court and defined as "all persons who possess or assert a claim for punitive damages" arising out of the grounding of the *Exxon Valdez* and the resulting oil spill, except for certain governmental entities. Pet. App. 126a.

Conditional Cross-Respondents are Exxon Mobil Corporation and Exxon Shipping Company (now known as SeaRiver Maritime, Inc.), defendants below. Defendants' employee Joseph Hazelwood was also a defendant below.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Conditional cross-petitioners, as representatives of the plaintiffs' mandatory punitive damages class, respectfully petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in this case in the event the petition in *Exxon Shipping Co. et al. v. Baker et al.*, No. 07-219, were to be granted.

OPINIONS BELOW

The amended opinion of the Ninth Circuit (Pet. App. 1a)[1] is reported at 490 F.3d 1066 (9th Cir. 2007). The district court's opinion (Pet. App. 118a) is reported at 296 F. Supp. 2d 1071 (D. Alaska 2004). An earlier opinion of the Ninth Circuit (Pet. App. 57a) is reported at 270 F.3d 1215 (9th Cir. 2001).

JURISDICTION

The court of appeals issued its amended opinion, entering final judgment and denying Exxon's petition for rehearing and rehearing en banc, on May 23, 2007. Pet. App. 1a. Exxon filed a petition for a writ of certiorari challenging that judgment on August 20, 2007, No. 07-219. This conditional cross-petition is being filed within thirty days of that petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

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[1] "Pet. App." citations refer to the Appendix to Exxon's petition for certiorari.

STATEMENT[2]

At Exxon's urging, a federal district court certified a mandatory class of 32,677 commercial fisherman, related individuals and businesses, private landowners, and Native Alaskans to decide in a single case – once and for all – whether to impose punitive damages against Exxon for its misconduct in causing the worst oil spill in our Nation's history.[3] After a three-phase trial that lasted 83 court days (reported in 7,714 pages of transcript), involved 155 witnesses, and produced 1,109 exhibits, the jury's September 1994 verdict assessed $5 billion in punitive damages against Exxon. At the time, this represented one year of Exxon's net profits. Pet. App. 215a. Today, it represents about six and one-half weeks of net profits and less than five days of revenue. *See* Exxon Mobil 2006 Annual Report, at 7, *available at* http://www.exxonmobil.com/corporate/files/corporate/XOM_2006_SAR.pdf.

The punitive damage verdict amounted to 9.92 times the concrete economic damages that plaintiffs suffered – a ratio that decreases substantially when one takes into account the plaintiffs' extensive and foreseeable non-economic harm, as well as the potential harm that was threatened by the supertanker's grounding but fortuitously did not come to pass. At the conclusion of a thirteen-year series of post-verdict motions, appeals and remands, the Ninth Circuit cut

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[2] Contrary to the tenor of Exxon's petition for certiorari, the historical facts must be viewed in the light most favorable to the plaintiffs, since they prevailed at trial. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435-41 & nn.12, 14 (2001).

[3] For purposes of this proceeding, Exxon Corporation (now Exxon Mobil Corporation) and its subsidiary Exxon Shipping Company stipulated that the two entities would be treated as one and that the acts and omissions of each of them would be chargeable against both of them. Pet. at 5; Stipulation and Order re: Certain Trial and Evidentiary Issues (No. 1) (CD 4365). Except where the context requires otherwise, the two entities are referred to here collectively as "Exxon."

the amount in half. This reduced the judgment to just under five times the economic harm, without taking into account the non-economic harm and potential harm.

While Exxon's post-verdict challenges have been pending, about 20 percent of the plaintiff class has died. Exxon has more than recouped the entire amount of the original $5 billion verdict by operation of the differential between its internal rate of return and the statutory judgment rate. After eighteen years of litigation, Exxon now seeks additional review from this Court and relief that could prolong the case for many years to come.

1. Congress authorized the Trans-Alaska Pipeline in 1973 to allow oil companies, including Exxon, to bring crude oil from Alaska's North Slope to market in the lower 48 States. From the pipeline's terminus in Valdez, Alaska, oil companies would load oil tankers and set sail through the "icy and treacherous" waters of Prince William Sound, Pet. App. 22a, before proceeding south.

The opening of the Port of Valdez promised Exxon the opportunity to reap enormous economic returns. At the same time, Exxon took on a well-documented responsibility to respect the resources on which Alaskans depend for their livelihoods. The waters of the Sound were "pristine" and "valuable for [their] fishing resources." Pet. App. 41a, 155a. The proceedings leading to the pipeline's approval emphasized that "[t]he economy of [the Prince William Sound] area depends almost entirely on commercial fishing, the processing of the catch, and related activities." 3 U.S. Dep't of Interior, Final Environmental Impact Stmt., Proposed Trans-Alaska Pipeline 370 (1972) (C.A. Supp. Excerpts of Record 1775).

Like the rest of the industry, Exxon well knew that "a major spill in the Valdez area would cause [an] incalculable

disaster to the fisheries," as well as to Native Alaskans engaged in subsistence living. C.A. Supp. Excerpts of Record 1797; *see also* Pet. App. 122a, 232a. Equipment adequate to contain such a spill did not exist in Alaska. The official contingency plan for the area acknowledged that a spill of over 200,000 barrels (8.4 million gallons) could not be contained, and Exxon, like others, knew that oil from a spill this large would "persist for years." C.A. Supp. Excerpts of Record 913-15, 1114.

Once the pipeline was completed, Exxon Shipping Company began running Exxon's shipping operations out of the Port of Valdez. An alcoholic culture pervaded Exxon Shipping Company. Supertanker crews held parties on board ship; drank together in port; "destroyed" confiscated liquor by drinking it; and violated rules that forbade returning to duty within four hours of drinking.[4] Although on paper the company had a policy that prohibited drinking aboard ship, it did not enforce the policy, and Exxon's crews were "pretty conscious of" the fact that reporting alcohol violations by officers "could come back to haunt you."[5]

Exxon put Captain Joseph Hazelwood in command of the *Exxon Valdez*, one of the supertankers that regularly transited Prince William Sound. Hazelwood was a relapsed alcoholic, and Exxon knew it. The "highest executives in Exxon Shipping knew that Hazelwood had an alcohol problem, knew he had been treated for it, and knew he had fallen off the wagon and was drinking on board their ships

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[4] Tr. 144:11-146:18, 148:14-154:5, 352:20-354:24, 365:15-366:20, 383:3-17, 384:16-385:23, 415:8-418:16, 875:1-21, 1696:8-24, 1710:1-1712:12, 2221:5-25, 2223:6-2224:13; C.A. Supp. Excerpts of Record 978-88.

[5] Tr. 800:3-6, 1070:21-23, 1631:1-15, 1707:20-1708:15, 2153:13-23, 2175:5-24, 2183:4-22, 2207:5-10, 3456:19-23; C.A. Supp. Excerpts of Record 1321.

and in waterfront bars." Pet. App. 64a. Multiple reports of Hazelwood's relapse began as early as the spring of 1986, less than a year after his return to duty following a 28-day alcohol treatment program. Pet. App. 63a, 121a, 154a-155a. At that time, an Exxon employee warned an Exxon port captain that Hazelwood "had fallen off the wagon." Tr. 2490:6-19; Pet. App. 121a. The report was relayed to the President of Exxon Shipping Company, who was told that Hazelwood was acting "kind of crazy or kind of strange." Tr. 2914:18-2916:4. The reports of Hazelwood's relapse continued until less than two weeks before the grounding of the *Exxon Valdez*. At that time, Hazelwood's supervisor received a report that Hazelwood had been drinking and making a series of insulting comments about another Exxon captain, including hurling curses at the other captain over the ship's radio. It was apparent that "something was wrong with" Hazelwood. Tr. 2140:15-2153:12, 2189:24-2196:9. Thus,

> [f]or approximately three years, Exxon's management knew that Captain Hazelwood had resumed drinking, knew that he was drinking on board their ships, and knew that he was drinking and driving. Over and over again, Exxon did nothing to prevent Captain Hazelwood from drinking and driving. Exxon repeatedly allowed Captain Hazelwood to sail into and out of Prince William Sound with a full load of crude oil.

Pet. App. 154a;[6] *see also* Pet. App. 64a, 83a, 89a-91a, 121a-122a, 155a-157a. To make matters worse, Exxon also "routine[ly]" staffed Hazelwood's ship, like its others, with

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[6] Nine words from the above-quoted portion of the district court's opinion are missing from the version of Petitioner's Appendix filed with the Court on August 20, 2007. We anticipate that Exxon will file a corrected version of this page of the appendix.

crews that were overworked and fatigued. Pet. App. 90a, 254a.

On the night of March 23, 1989, the *Exxon Valdez* departed Valdez almost fully loaded with 53 million gallons of crude oil. Hazelwood was the captain and the only officer on board licensed to navigate the tanker through the critical parts of Prince William Sound. Predictably, he also was drunk – "so drunk that a non-alcoholic would have passed out." Pet. App. 87a. Before boarding the ship, Hazelwood had consumed "at least five doubles (about fifteen ounces of 80 proof alcohol) in waterfront bars." Pet. App. 64a. Around midnight, Hazelwood left the bridge and descended to his cabin, leaving control over the tanker to the "fatigued" third mate. *Id.* Shortly thereafter, with the third mate left to perform both his own job and Hazelwood's, the tanker ran aground on Bligh Reef, a "known and foreseen hazard." Pet. App. 61a.

The reef ripped open the ship's hull, releasing 11 million gallons of crude oil into the Sound. Wind and water spread the oil over 600 miles in the midst of one of the nation's most productive commercial fisheries.

"In keeping with its legal obligations, Exxon undertook a massive cleanup effort." Pet. App. 124a. But the jury could have concluded that Exxon directed its efforts more at appearances than effects. Exxon cleaned up only 14 percent of the oil it had spilled. *See* Exxon Valdez Oil Spill Trustee Council, *Lingering Oil*, *available at* http://www.evostc.state.ak.us/Habitat/lingering.cfm (last visited Aug. 24, 2007). One Exxon official was captured on tape at the time demanding the deployment of cleanup equipment and explaining: "I don't care so much whether it's working or not but . . . it needs to be something out there that looks like an effort is being made. . . . I don't care if it picks up two gallons a week. Get that shit out there . . . and . . . standing

around where people can see it." C.A. Supp. Excerpts of Record 1096.

In addition to causing extensive environmental harm, the oil spill "disrupted the lives (and livelihood) of thousands of [people in the Prince William Sound area] for years." Pet. App. 24a. It required the State of Alaska to close fishing seasons in 1989, reduced harvests in later years, and caused fish prices to drop. It damaged approximately 1,300 miles of shoreline, much of it privately owned. It also destroyed the subsistence activities of Native Alaskans, "for whom subsistence fishing is not merely a way to feed their families but an important part of their culture." Pet. App. 123a. As would be expected from a disaster that cripples an entire regional economy, "the social fabric of Prince William Sound and Lower Cook Inlet was torn apart," producing a high incidence of severe depression, post-traumatic stress, and generalized anxiety disorder among those whose lives depended on harvesting the resources of the Sound. Pet. App. 150a-151a, 166a-167a.

2. Thousands of private claimants filed suit against Exxon. At Exxon's urging, the district court certified a mandatory punitive damages class including all persons with potential punitive damage claims. Pet. App. 67a. While the state and federal governments separately sought civil and criminal penalties against Exxon for the oil spill's effect on the environment, this case was (and is) the only one designed to address harm to "private economic and quasi-economic resources." Pet. App. 2a. And because Exxon quickly entered into settlements with the governments, this litigation provided the first opportunity for the facts surrounding the spill to be fully developed and revealed in an adversarial proceeding. Pet. App. 174a n.111.

As the Ninth Circuit later remarked, the district court "did a masterful job of managing this very complex case." Pet.

App. 67a. After five years of discovery, it tried the case to a jury in three phases:

In the first phase, the jury found that Hazelwood and Exxon had been reckless, which allowed for the possibility of imposing punitive damages against them. Pet. App. 67a.

In the second phase, the jury awarded $287 million in compensatory damages for economic harm to the commercial fishermen in the major fisheries. Pet. App. 160a. Other proceedings addressed harm to the other victims of the spill, including fishermen in other fisheries, fish processors, other area businesses, land owners, Native Alaskans, municipalities, and others. In the post-trial proceedings the district court and the court of appeals determined that the total amount of economic harm to all class members exceeded $500 million. Pet. App. 38a, 160a-163a. Unlike plaintiffs in an ordinary modern tort action, however, these plaintiffs could not recover additional damages for the non-economic harm they suffered: maritime law, retaining narrow nineteenth-century conceptions of recoverable compensatory damages, permitted recovery only for their economic losses, not for their emotional and psychological injuries. *See generally Union Oil Co. v. Oppen*, 501 F.2d 558, 565-71 (9th Cir. 1974); *cf. Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 n.11 (2001).

In the third phase, the jury considered whether to impose punitive damages on Exxon or Hazelwood and, if so, how much to impose. Arguing from a stipulation that (accurately, as it turned out) estimated the total economic harm to the plaintiff class as between $432 million and $768 million, plaintiffs urged the jury to impose punitive damages between $5 billion and $20 billion against Exxon. Because the instructions would explain to the jury that "[t]he fact that you have found the defendant's conduct to be reckless does not necessarily mean that it was reprehensible or that an award of

punitive damages should be made," Tr. 7659:10-13, Exxon urged that it should not have to pay any punitive damages because it did not act reprehensibly, even if its conduct was reckless. Tr. 7602:6-7603:19. Following "unusually detailed" instructions that counsel for both parties endorsed and that "embodied" "the very same concepts" later elaborated in this Court's due process jurisprudence, Pet. App. 127a, 146a, the jury returned a verdict for $5 billion against Exxon.[7]

3. In its first review of the case, the Ninth Circuit affirmed the jury's compensatory verdict. It also upheld the jury's decision to award punitive damages against Exxon, confirming among other things that Exxon's knowledge of Hazelwood's relapse rendered its own conduct reprehensible. Pet. App. 97a. However, the court of appeals remanded the case for the district court to reconsider the size of the punitive award in light of this Court's intervening decisions in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). The Ninth Circuit did not direct the district court to reach any particular result, but it nevertheless noted that it believed that the punitive verdict was "too high" and "must be reduced." Pet. App. 104a.

4. On remand, the parties' "robust presentations" and the district court's own independent analysis led it to the conclusion that "a $5 billion award was justified by the facts of this case and is not so excessive as to deprive Exxon of . . . its right to due process." Pet. App. 221a. But because the Ninth Circuit had asked the district court not only to apply the *BMW* guideposts "in the first instance," Pet. App. 95a,

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[7] The Phase III jury instructions are reproduced in the appendix to plaintiffs' brief in opposition. Exxon's petition unaccountably does not include the instructions that provided the foundation for the punitive damages verdict.

but also to reduce the award, the district court cut the award to $4 billion "as the means of resolving the conflict between its judgment and the directions of the court of appeals." Pet. App. 222a-223a. Exxon appealed, and the plaintiffs cross-appealed.

5. While the cross-appeals were pending, this Court further elucidated the due process principles governing punitive damages in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003). Accordingly, the Ninth Circuit again remanded the case to the district court, so it could reconsider its latest decision in light of *State Farm*.

In a new eighty-one page opinion that painstakingly applied this Court's guidance, the district court again concluded that the $5 billion jury verdict satisfies due process. It based this conclusion on its findings that: (1) Exxon's conduct was "highly reprehensible"; (2) the ratio of punitive damages to concrete economic harm was 9.74 to 1,[8] which lies within the "single-digit" guidepost endorsed in *State Farm* and falls still lower once non-economic and potential harms are taken into account; and (3) "comparable civil and criminal penalties could have exceeded $5 billion." Pet. App. 179a. But because the Ninth Circuit's remand order following *State Farm* had not disturbed its earlier direction to reduce the award, the district court again obeyed that guidance. In reliance on *State Farm*'s discussion of single-digit ratios, it entered a new judgment setting the punitive damages at $4.5 billion – representing roughly a 9 to 1 ratio between the punitive damages and the economic damages. Pet. App. 179a-180a.

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[8] This ratio was based on the district court's finding that the economic harm totaled $513 million. Pet. App. 163a. The Ninth Circuit later adjusted that calculation downward to $504 million, Pet. App. 38a, making the ratio 9.92 to 1.

6. Both parties again cross-appealed. A divided Ninth Circuit reduced the award to $2.5 billion. Every member of the Ninth Circuit panel accepted the district court's extensive historical factual findings. But in the majority's view, Exxon's actions, combined with its mitigation efforts immediately following the spill, placed its misconduct in the "mid" or "higher realm" of reprehensibility, "but not the highest realm." Pet. App. 31a. In contrast to the district court, the panel majority also interpreted this Court's *State Farm* opinion as "reserv[ing] the upper echelons of constitutional punitive damages (a 9 to 1 ratio) for conduct done with the most vile of intentions." Pet. App. 24a. Accordingly, the majority settled on the conclusion that a 5 to 1 ratio to the economic harm (without accounting for the additional non-economic harm and potential harm) was the maximum ratio that due process would allow. Pet. App. 40a.

Judge Browning dissented. Pet. App. 42a. He found that Exxon's conduct was "highly, if not extremely reprehensible" and that its post-tort actions did not alter the reprehensibility of its tort. Pet. App. 46a. Judge Browning also concluded that a ratio higher than 5 to 1 was permissible in view of the facts that "not all of plaintiffs' damages were quantifiable, not all of it was compensated, and the plaintiffs were likely to incur further costs," as well as the fact that the *Exxon Valdez* disaster also threatened additional "massive and foreseeable" potential harm. Pet. App. 53a, 55a. He "therefore agree[d] with the district court's assessment that there is no principled means by which this award should be reduced." Pet. App. 56a.

7. Exxon petitioned for rehearing en banc. The Ninth Circuit denied the petition, with only two of its twenty-three non-recused active judges dissenting. Without addressing any of the district court's or the panel's extensive factual findings detailing Exxon's failure to remove Hazelwood from command despite the multiple reports of his relapse, Judge

Kozinski argued that punitive damages were inappropriate here because all Exxon did was have "the misfortune of hiring a captain who committed a reckless act." Pet. App. 291a.[9] Judge Bea argued that a 5 to 1 ratio was excessive because Exxon's conduct did not inflict physical injury, and Exxon could not be punished for harm to the environment. Pet. App. 293a.

REASONS FOR GRANTING THE CONDITIONAL WRIT

Exxon has asked this Court to review the Ninth Circuit's due process evaluation of the size of the jury's punitive damages award. For the reasons stated in plaintiffs' brief in opposition to that petition, that fact-intensive issue does not raise any legal question warranting this Court's review, and plaintiffs urge this Court to deny Exxon's petition.

Should this Court nevertheless decide to review the Ninth Circuit's decision, the Court should consider not only whether the Ninth Circuit's opinion leaves the punitive damages award too large, but also whether it makes the award too small. Two of the four federal judges who have conducted plenary reviews of the jury's punitive award – the district judge (in three progressively more searching reviews

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[9] It was not surprising that Judge Kozinski disregarded the actual record in this case. Shortly after the jury rendered its verdict, and before the Ninth Circuit commenced review, Judge Kozinski had publicly criticized the verdict in a widely circulated op-ed piece that questioned the common law system of allowing private plaintiffs to recover punitive damages. The piece bracketed this verdict with such widely criticized punitive damage verdicts as that in the McDonald's "hot coffee case." Alex Kozinski, *The Case of Punitive Damages v. Democracy*, WALL ST. J., Jan. 19, 1995, at A18, *available at* http://alex.kozinski.com/articles/Case_of_Punitive_Damages.pdf (last visited Aug. 26, 2007). Judge Kozinski did not recuse himself from the en banc proceedings here. *See* 28 U.S.C. § 455(a).

reflecting the evolution of this Court's punitive damage jurisprudence) and Judge Browning – have concluded that the full $5 billion verdict comports with due process. *See* Pet. App. 42a, 118a, 182a, 224a. Exxon's conduct was highly reprehensible; the jury's punitive award bears a 9.92-to-1 ratio to the economic harm that Exxon caused and falls to a ratio in the low single digits after taking account of the additional non-economic harm and potential harm; and comparable penalties gave Exxon fair notice that it could be punished well into the billions of dollars for a spill such as this one.

Assessing whether the district judge and Judge Browning are correct – or at least whether the Ninth Circuit's majority exceeded its authority by unduly reducing the punitive award – would not require this Court to expend any judicial resources beyond those necessary to consider Exxon's challenge to the award. In both instances, this Court would have to assess whether the jury's $5 billion punitive damages award is "grossly excessive," *State Farm*, 538 U.S. at 416, and, if so, to determine the maximum amount constitutionally permissible on the facts viewed in the light most favorable to the plaintiffs. If this Court chooses to undertake that fact-intensive analysis, it should not artificially foreclose itself from issuing a judgment holding that the jury's punitive award is not grossly excessive, or at least that the Due Process Clause allows an award of more than $2.5 billion.

CONCLUSION

Should this Court grant Exxon's petition for a writ of certiorari, the Court also should grant the conditional cross-petition for a writ of certiorari.

Respectfully submitted,

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